United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7194

To be argued by
BRUCE E. PINDYCK

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 77-7194

UNITED STATES COURT OF APPEALS
FILED
AUG 10 1977
M. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ELI RAITPORT,

Plaintiff-Appellant,

against

GENERAL ELECTRIC COMPANY, WESTINGHOUSE CORP., RADIO CORPORATION OF AMERICA, and WHIRLPOOL CORP.,

Defendants-Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE WESTINGHOUSE ELECTRIC CORPORATION

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TABLE OF CONTENTS

	Page
Table of Cases, Statutes and Authorities	ii
Counterstatement of the Issue	1
Counterstatement of the Facts	1
A. The District Court's Dismissal of Plaintiff's Action	1
B. Plaintiff's Failure to Prosecute His Action ..	3
C. Plaintiff's Failure to Comply with Discovery Requests	5
D. Plaintiff's Disrespect for the Court and Bad Faith Conduct in the Litigation	6
E. Plaintiff's Failure to Attend a Pretrial Conference	9
Argument	
POINT I--THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING PLAINTIFF'S ACTION	10
POINT II--DESPITE PLAINTIFF'S CONTENTIONS TO THE CONTRARY, THE DISTRICT COURT ENTERED FINDINGS OF FACT	15
Conclusion	18

TABLE OF CASES, STATUTES AND AUTHORITIES

Page

Cases

Ali v. A & G Co., Inc.,
542 F.2d 595 (2d Cir. 1976) 12

Amplex of Maryland, Inc. v. Outboard Marine Corp.,
380 F.2d 112 (4th Cir. 1967),
cert. denied, 389 U.S. 1036 (1968) 17

Boutte v. M/V Malay Maru,
370 F.2d 906 (5th Cir. 1967) 17

Culpepper v. Reynolds Metals Co.,
442 F.2d 1078 (5th Cir. 1971) 17

Delno v. Market St. Ry.,
124 F.2d 965 (9th Cir. 1942) 10

Delta Theatres, Inc. v. Paramount Pictures, Inc.,
398 F.2d 323 (5th Cir. 1968) 14

Esteva v. House of Seagram, Inc.,
314 F.2d 827 (7th Cir. 1963) 16

Fendler v. Westgate-California Corp.,
527 F.2d 1168 (9th Cir. 1975) 15

Hyler v. Reynolds Metal Co.,
434 F.2d 1064 (5th Cir. 1970),
cert. denied, 403 U.S. 912 (1971) 14

Kenney v. California Tanker Co.,
381 F.2d 775 (3d Cir. 1967),
cert. denied, 390 U.S. 904 (1968) 15

Link v. Wabash Railroad Co.,
370 U.S. 626 (1962) 11, 12

Marshall v. Sielaff,
492 F.2d 917 (2d Cir. 1974) 10

Page

Papilsky v. Berndt,
466 F.2d 251 (2d Cir.),
cert. denied, 409 U.S. 1077 (1972) 14

Ramsay v. Bailey,
531 F.2d 706 (5th Cir. 1976) 15

Theilmann v. The Rutland Hospital, Inc.,
455 F.2d 853 (2d Cir. 1972) 10

Statutes

Federal Rules of Civil Procedure, Rule 41(b) 11, 15

Federal Rules of Civil Procedure, Rule 52(a) 15, 16

Authorities

5 Moore's Federal Practice ¶ 41.11[2] at 41-148 17

UNITED STATES COURT OF APPEALS

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Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE WESTINGHOUSE ELECTRIC CORPORATION

Counterstatement of the Issue

1. Did the District Court abuse its discretion in dismissing plaintiff's action on the merits with prejudice for failure to prosecute the action, failure to grant discovery in accordance with the Federal Rules of Civil Procedure and the directives of the District Court and failure of plaintiff to maintain the lawsuit in good faith?

Counterstatement of the Facts

A. The District Court's Dismissal of Plaintiff's Action

On February 25, 1977, at a scheduled pretrial

conference, upon motion by defendants, the District Court dismissed plaintiff's action with prejudice. The District Court entered its findings in a memorandum opinion dictated from the bench. The District Court found that "plaintiff ha[d] neglected to prosecute this action, that he ha[d] conducted his litigation in a frivolous fashion and in a manner which is not to be permitted in this court." The District Court further found that plaintiff was "an experienced and capable pro se litigant; that plaintiff "ha[d] not complied with the obligation of discovery"; that plaintiff's "entire conduct of the matter ha[d] . . . risen to a level which [the] Court [did] not have to put up with"; that "[t]here ha[d] been a failure to grant discovery . . . a failure to attend a pretrial conference, although specifically orally directed" to appear; and that "on May 2, 1975 at a hearing . . . [plaintiff] suggested . . . that Judge Knapp of this district had been bribed." (R. 49 and 53, Transcript of Hearing before District Court on February 25, 1977, pp. 6-8).* On March 10, 1977, the District Court entered its judgment in accordance with its opinion. The judgment specifically stated that the action was dismissed on "grounds of failure to prosecute, failure to grant dis-

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* The citations are to the Index to the Record on Appeal, which will be referred to as R. __.

covery in accordance with the Federal Rules of Civil Procedure and the directives of the Court and failure of plaintiff to maintain the lawsuit in good faith" (R. 54, Judgment).

The facts fully support the District Court's findings.

B. Plaintiff's Failure to Prosecute His Action

Plaintiff commenced his action in the District Court on or about May 23, 1974, against General Electric, Westinghouse, RCA and Whirlpool (R. 1, Complaint). Plaintiff has initiated no discovery during this entire period. In fact, the only issue litigated by plaintiff in the last two and one-half years has been whether he can proceed in forma pauperis. Plaintiff made innumerable applications for leave to proceed in forma pauperis, which have been repeatedly denied because plaintiff was unable to demonstrate an inability to pay court costs.*

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* Initially, by order dated May 10, 1974, plaintiff was permitted to file his complaint in forma pauperis (R. 1, District Court Order dated May 10, 1974). However, as the facts were developed in the case, it became apparent that plaintiff was not seeking leave to proceed in forma pauperis in good faith and all subsequent orders, including the orders entered by this Court, denied plaintiff's applications (R. 15, District Court Certification to Court of Appeals dated August 16, 1974; R. 30, Order of Second Circuit Court of Appeals dated February 21, 1975; R. 35, Memorandum Opinion and Order of District Court dated May 21, 1975; R. 42, Endorsed Memorandum Opinion and Order of District Court dated September 25, 1975; R. 44, Order of Second Circuit Court of Appeals dated January 8, 1976).

It appears that plaintiff would rather litigate the in forma pauperis claim rather than his claim as set forth in his complaint. The gravamen of plaintiff's complaint appears to be that since 1967 he has been involved in the "development of safer and more economical switches and vibration isolators for use in appliances" (R. 1, Complaint ¶ 3); that such switches "are superior in safety and substantially more economical tha[n] the presently used switches for said purposes by the said defendants" (R. 1, Complaint ¶ 5); that the plaintiff offered and the defendants "refused to consider or considered and declined the plaintiff's proposal" allegedly because: "a) [t]he said defendants are not interested to reduce the cost of appliances in clearly identifiable manner such as reducing cost of components . . . b) [t]he said defendants are trying to discourage anyone from entering the field of major appliance engineering because a company with good engineering abilities might some day develop into a competitor; [and] c) [t]he said defendants by policy are not helping and not encouraging any new starting companies" (R. 1, Complaint ¶ 7).

Defendants originally moved to dismiss plaintiff's complaint and that motion was granted on the ground that the complaint seemed "to be based on the defendants' [inde-

pendent refusal] to buy plaintiff's switches and vibration isolators" and that "merely alleging parallel business behavior, without more, [was] not sufficient to state a claim under the antitrust laws upon which relief can be granted" (Memorandum Opinion and Order dated August 1, 1974, p. 6). Plaintiff was, however, granted leave to amend his complaint and in his amended complaint, he alleged a conspiracy amongst defendants (R. 17). Plaintiff has not substantiated that charge in any way whatsoever.

C. Plaintiff's Failure to Comply with Discovery Requests

The District Court's finding that plaintiff failed to grant discovery in accordance with the Federal Rules of Civil Procedure was fully supported by the record.

At a pretrial conference held on December 7, 1976, the District Court ordered that all discovery in the case should be substantially complete by the February 25, 1977 pretrial conference. In accordance with that direction, defendants served upon plaintiff a notice of deposition and a request for production of documents (R. 48). On February 8, 1977, plaintiff's deposition was taken (R. 52). At the deposition, plaintiff refused to answer a number of questions propounded by defendants. Plaintiff charged in paragraph 7(c) of his amended complaint that defendants "by mutual consent and agreement established its policy

not to deal with new engineering firms in order to restrain competition" (R. 17). In his memorandum opinion and order dated December 5, 1974, Judge Bonsal held that that allegation was sufficient to withstand a motion to dismiss (Memorandum Opinion and Order of District Court dated December 5, 1974). Plaintiff was asked at his deposition to state the facts that he had to support that allegation in his complaint (R. 52, Transcript of Plaintiff's Deposition, pp. 41-49). Plaintiff refused to answer that question fully. In addition, plaintiff failed to produce any documents in compliance with defendants' documentary request.

D. Plaintiff's Disrespect for the Court and Bad Faith Conduct in the Litigation

As stated by the District Court in its opinion dismissing plaintiff's action with prejudice, plaintiff has evidenced a total disrespect for the courts.

On July 8, 1974, oral argument on defendants' original motions to dismiss were heard in the District Court. Shortly thereafter, on or about July 17, 1974, plaintiff moved to recuse the District Judge pursuant to 28 U.S.C. § 144 on the ground that the District Judge was biased and prejudiced against plaintiff. Plaintiff stated that certain remarks made by the District Judge at the July 8 hearing concerning plaintiff's decision to proceed

without the services of a lawyer evidenced the District Judge's prejudice. Plaintiff further argued in his motion that the District Judge "arbitrarily rejected to hear testimony, cross-examination and arguments" (R. 13, Plaintiff's Motion for Reassignment). On August 1, 1974, the District Judge entered his memorandum opinion denying plaintiff's motion for reassignment, holding that the motion was not made in good faith (District Court Memorandum Opinion and Order dated August 1, 1974, pp. 4-5). In appealing the District Judge's August 1, 1974 order, plaintiff moved for leave to appeal in forma pauperis. On August 16, 1974, the District Judge certified that plaintiff was not entitled to proceed in forma pauperis on his appeal, stating that he did not believe that the appeal was taken in good faith (R. 15, District Court Certification to Court of Appeals dated August 16, 1974).

On January 1, 1975, this action was reassigned from Judge Bonsal to Judge Brieant. Subsequently, this Court, on February 21, 1975, denied plaintiff's motion for leave to appeal in forma pauperis and dismissed the appeal as moot, on the basis of the District Court's order permitting plaintiff to proceed with an amended complaint.

On April 24, 1975, plaintiff again moved in the District Court for an order granting him leave to proceed

in forma pauperis pursuant to 28 U.S.C. § 1915. On May 21, 1975, the District Court denied plaintiff's motion. The District Judge, in his memorandum opinion, stated in part:

> "The Court perceives plaintiff's true purpose to be that of obtaining a lawyer at public expense. . . . Plaintiff does not appear to be entitled to proceed in forma pauperis." (R. 35, Memorandum Opinion and Order of District Court dated May 21, 1975).

Incredibly, at the oral argument on plaintiff's April 24, 1975 motion to proceed in forma pauperis, plaintiff accused the District Judge who granted summary judgment against plaintiff in another case of being bribed. Plaintiff stated at oral argument:

> "MR. RAITPORT: Number two, the counsel just mentioned about the appeal, about the case before -- Judge Knapp is refused the motion. Well, number one, is to be perhaps mentioned that there is pending, there is an affidavit been filed that Judge Knapp was bribed.
>
> "THE COURT: He was what?
>
> "MR. RAITPORT: Bribed.
>
> "THE COURT: I didn't hear the word.
>
> "MR. RAITPORT: I say bribed.
>
> "THE COURT: Judge Knapp of this court?
>
> "MR. RAITPORT: Such an affidavit has been filed.
>
> "THE COURT: All right, I don't want to hear any more argument on this motion.

"MR. RAITPORT: I don't want to say this any more.

"THE COURT: I don't want to hear any more argument.

"MR. RAITPORT: I don't want to say this any more.

"THE COURT: He was bribed? Who bribed him?

"MR. RAITPORT: I don't want to say this any more except such an affidavit has been filed."

(R. 40, Transcript of Hearing before District Court on May 2, 1975, pp. 11-12).*

E. Plaintiff's Failure to Attend a Pretrial Conference

At a prior pretrial conference held on December 7, 1976, the District Court ordered the parties to appear at a pretrial conference to be held at 9:15 A.M. on February 25, 1977. Consistent with his prior behavior in the action, plaintiff failed to appear on time, and the Court, taking into consideration the entire proceedings in the case and plaintiff's conduct, dismissed the action with prejudice.

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* Plaintiff has also made scandalous accusations against defendants' attorneys. On or about July 2, 1974, after defendants moved for an order dismissing plaintiff's complaint, plaintiff moved for an order sanctioning defendants' attorneys because of alleged misstatements by defendants' attorneys in their moving papers (R. 11, Motion to Impose Sanctions on Defendants' Attorneys). That motion was denied by the District Court; the District Court found that plaintiff's motion was without merit (Memorandum Opinion and Order of District Court dated August 1, 1974, p. 7).

Argument

POINT I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING PLAINTIFF'S ACTION

The standard of review on a dismissal for failure to prosecute is whether the District Court has abused its discretion and this standard has been interpreted strictly:

> "Discretion . . . is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Delno v. Market St. Ry., 124 F.2d 965, 967 (9th Cir. 1942).

See Marshall v. Sielaff, 492 F.2d 917 (2d Cir. 1974); Theilmann v. The Rutland Hospital, Inc., 455 F.2d 853 (2d Cir. 1972).

Clearly, in the instant case, there was no abuse of discretion.

The grounds for dismissing plaintiff's action with prejudice were set forth by the District Court in its opinion dictated into the record at the February 25, 1977 pretrial conference. They included:

(a) plaintiff's failure to prosecute the action;

(b) plaintiff's failure to comply with the obligations of discovery; and

(c) plaintiff's failure to attend a pretrial conference although specifically directed to so appear.

The District Court also noted that plaintiff accused a judge of bribery (R. 49 and 53, Transcript of February 25, 1977 Hearing, pp. 6-8).

The law is well-settled that under such circumstances, a District Court, in the exercise of its discretion, may dismiss an action with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure.

The Supreme Court so held in Link v. Wabash Railroad Co., 370 U.S. 626 (1962), where the Court affirmed the dismissal by the District Court sua sponte of a diversity negligence action. As in the instant case, petitioner had failed to appear at a pretrial conference. The case had been pending since August 24, 1954 and had been delayed substantially by plaintiff's dilatoriness, including plaintiff's failure to respond to defendant's first set of interrogatories for a year and a half. Apparently, plaintiff initiated no discovery on his own. With respect to the power of the court to dismiss plaintiff's action with prejudice for failure to prosecute, the Supreme Court stated:

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice

> because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." 370 U.S. at 629-30.

The petitioner in the Link case also made a due process argument, contending that the failure of the District Court to advise or give notice of the possibility of dismissal rendered the dismissal void. The Supreme Court rejected this argument as well, stating:

> "Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' . . . But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity of advance notice and hearing." 370 U.S. at 632.

Recently, this Circuit held that an involuntary dismissal may be entered for plaintiff's failure to comply with the District Court's discovery directives and for failure to appear at Court as ordered. In Ali v. A & G Co., Inc., 542 F.2d 595 (2d Cir. 1976), the Court dismissed

the case with prejudice for lack of prosecution. At a pre-trial conference of the parties on October 17, 1975, the District Judge directed that discovery be completed by December 17, 1975 and that the case be placed on his ready trial calendar on January 9, 1976. On January 8, 1976, well after discovery was supposed to have been finished and only one day before the case was to go on the ready trial calendar, counsel for plaintiffs-appellants requested that trial be delayed because he had not yet completed discovery. The Court refused the request and the case appeared on the ready trial calendar the next day. When the case came to trial on January 14, 1976, appellants' counsel advised the Court that neither the attorney who was to try the case nor appellants were available. The Court dismissed the case on this basis and the dismissal was affirmed. The Court of Appeals stated:

> "Dismissal of the case for failure to prosecute lies within the discretion of the district court. . . . Here appellants and their counsel were guilty of three separate delinquencies. First, they failed to advise the court of the problem caused by the defendants' failure to submit to discovery until the eve of trial, long after the date by which discovery was supposed to have been completed. . . .
>
> "Secondly, although the trial date was known well in advance and appellants should have arranged their affairs so as to be available for trial, they failed to do so. Lastly. their trial counsel, with similar notice of the trial date, also failed to appear." 542 F.2d at 596.

The Court further stated that the judge "did not abuse his discretion in dismissing the action with prejudice." 541 F.2d at 597. See Papilsky v. Berndt, 466 F.2d 251 (2d Cir.), cert. denied, 409 U.S. 1077 (1972).

Similarly, in Hyler v. Reynolds Metal Co., 434 F.2d 1064 (5th Cir. 1970), cert. denied, 403 U.S. 912 (1971), plaintiffs-appellants complained that the District Court erred in dismissing appellants' action because of the failure of appellants' attorneys to appear at a pretrial hearing. In addition, plaintiffs had been ordered to amend their complaint and they had failed to comply with the Court's order over a period of approximately nine months. The Fifth Circuit affirmed the District Court's dismissal, stating:

> "It is well settled that a district court has inherent power to dismiss a case for failure to prosecute and there is no abuse of discretion when counsel fails to appear at a pre-trial conference and when there is evidence of prior dilatory conduct." 434 F.2d at 1065.

In Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir. 1968), the Court affirmed the involuntary dismissal of an action where the District Court found that the order to file a note of evidence and list of documents was not complied with; that an order for a pre-trial conference was continued indefinitely on appellant's motions; that a hearing on the motion to dismiss for failure

to prosecute was continued twice on plaintiff's motion; and that no action had been taken by plaintiff in the case for several years. See Ramsay v. Bailey, 531 F.2d 706 (5th Cir. 1976); Fendler v. Westgate-California Corp., 527 F.2d 1168 (9th Cir. 1975); Kenney v. California Tanker Co., 381 F.2d 775 (3d Cir. 1967), cert. denied, 390 U.S. 904 (1968).

POINT II

DESPITE PLAINTIFF'S CONTENTIONS TO THE CONTRARY, THE DISTRICT COURT ENTERED FINDINGS OF FACT

Plaintiff argues in his brief that the District Court did not enter its findings, which, he argues, is required by Rule 41(b) of the Federal Rules of Civil Procedure. In fact, the District Court did enter its findings -- in its opinion entered from the bench at the February 25, 1977 hearing (R. 49 and 53, Transcript of February 25, 1977 hearing, pp. 6-8). Such findings, including plaintiff's failure to prosecute, failure to grant discovery, failure to follow the directives of the Court and failure to maintain the lawsuit in good faith, were also set forth in the judgment (R. 54).

Rule 52(a) specifically provides that findings of fact and conclusions of law may appear in an opinion or memorandum. Under circumstances strikingly similar to the

instant case, the Seventh Circuit held that findings entered by the District Court on the record were sufficient to meet the requirements of Rule 52(a). Esteva v. House of Seagram, Inc., 314 F.2d 827 (7th Cir. 1963). Esteva was a sua sponte involuntary dismissal by the District Court. The dismissal was taken after the trial judge had waited an hour beyond the appointed time for plaintiff and his counsel to appear on the second day of trial. The trial judge pointed out that on numerous other occasions the case had been continued because of the inability of the plaintiff to be ready for trial and at all times counsel for the plaintiff had been late. In dismissing the case, with prejudice, the Court made a statement on the record giving its reasons for the dismissal. At the time that the case was dismissed, the plaintiff's attorney was not in the court room as in the instant case. Plaintiff made the argument that the dismissal should be reversed for the failure of the Court to enter express findings of fact and conclusions of law. The Court of Appeals did not find this contention meritorious, stating:

> "We find no merit in plaintiff's contention that the failure of the District Court to make and enter express findings of fact and conclusions of law requires a reversal of its judgment of dismissal. The summary jurisdiction here exercised was not within the purview of Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C.A.). Plaintiff's action was not 'tried

> upon the facts'. It was dismissed for plaintiff's failure to proceed with the trial upon the facts at the appointed time. And, in any event, the district judge's statement for the record was sufficient to indicate the factual basis for the ultimate conclusion and action, within the spirit and intent of Rule 52(a), and to adequately fulfill the rule's purpose as an aid to the appellate court on review." 314 F.2d at 830.*

Similarly, in Boutte v. M/V Malay Maru, 370 F.2d 906 (5th Cir. 1967), the Court found that oral findings stated into the record were sufficient. The Court stated:

> ". . . the oral findings stated into the record at the conclusion of Libelant's case and the arguments of counsel will suffice. If adequate to review essential findings, the form is not too important." 370 F.2d at 908.

In Culpepper v. Reynolds Metals Co., 442 F.2d 1078 (5th Cir. 1971), the Court found that findings set forth in a judgment were legally sufficient. The Court stated:

> "Looking at the four corners of the Order of Judgment, we deem its findings and conclusions legally sufficient and their intendment sufficiently clear." 442 F.2d at 1080.

See Amplex of Maryland, Inc. v. Outboard Marine Corp., 380 F.2d 112, 113 (4th Cir. 1967), cert. denied, 389 U.S. 1036 (1968).

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* Significantly, as can be seen from the above quote, the Court in Esteva found that findings were unnecessary for an involuntary dismissal where there was not a trial upon the facts. (See 5 Moore's Federal Practice ¶ 41.11[2] at 41-148 wherein Professor Moore stated: "A trial court is not required to make findings of fact or conclusions of law in an order dismissing for failure to prosecute."

CONCLUSION

Based on the foregoing, it is respectfully submitted that the judgment in favor of defendants be affirmed.

August 10, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

No. 77-7194

ELI RAITPORT, :

Plaintiff-Appellant, :

AFFIDAVIT OF SERVICE

- against - :

GENERAL ELECTRIC COMPANY, WESTINGHOUSE CORP., RADIO CORPORATION OF AMERICA, and WHIRLPOOL CORP., :

Defendants-Appellees. :

- -X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BRUCE E. PINDYCK, being duly sworn, deposes and says: that deponent is not a party to this action and is over the age of 18 years and resides at 555 Park Avenue, New York, New York 10021. Deponent further states that on the 10th day of August, 1977 he served the within Brief for Defendant-Appellee Westinghouse Electric Corporation upon plaintiff-appellant Eli Raitport and attorneys for defendants-appellees, by depositing two true copies thereof in a securely sealed, postpaid wrapper in a United States Post Office Box located at 299 Park Avenue, New York, New York 10017, addressed as follows:

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Deponent further says that the addresses set forth on said wrappers are the office and post office addresses given by said plaintiff-appellant and attorneys upon the last papers served by them in the within action.

Bruce E. Pindyck

Bruce E. Pindyck

Sworn to before me this
10th day of August, 1977.

Laura A. Ferri

Notary Public

LAURA A. FERRI
Notary Public, State of New York
No. 24-4645126
Qualified in Kings County
Certificate filed in New York County